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No. 73-546

In the Supreme Court of the United States

OCTOBER TERM, 1973

EARL L. BUTZ, SECRETARY OF AGRICULTURE,
PETITIONER

v.

KATIE CARTER, ON BEHALF OF THE HOUSEHOLD OF THOMASENA TINDALL, DECEASED, ET AL.

AND

HELENE WOHLGEMUTH, SECRETARY OF WELFARE OF THE COMMONWEALTH OF PENNSYLVANIA, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes and regulations involved	2
Statement	4
Reasons for granting the writ	10
Conclusion	20
Appendix A	21
Appendix B	32
Appendix C	34
Appendix D	42

CITATIONS

Cases:

Bermudez v. *U.S. Dept. of Agriculture*, 348 F. Supp. 1279, appeal pending, No. 72–2138, C.A.D.C. 17, 18, 19

Biakanja v. *Irving*, 49 Cal. 2d 647, 320 P. 2d 16 14

Employees v. *Missouri Public Health Dept.*, 411 U.S. 279 ..... 14, 16, 17

Euresti v. *Stenner*, 458 F. 2d 1115 13

Hans v. *Louisiana*, 134 U.S. 1 17

Harrell v. *Harder*, No. 13,800, D. Conn. (decided June 13, 1973) 19

Indian Towing Co. v. *United States*, 350 U.S. 61 16

J. I. Case Co. v. *Borak*, 377 U.S. 426 13

Jordan v. *Weaver*, 472 F. 2d 985, certiorari granted *sub nom. Edelman* v. *Weaver*, No. 72–1410, June 11, 1973 ..... 16, 17

522-071—73——1

Cases—Continued Page
King v. *Smith*, 392 U.S. 309 15
Lidie v. *California*, 478 F. 2d 552 19
Parden v. *Terminal Ry. of Alabama*, 377 U.S. 184 ..... 9, 14, 15, 17
Rothstein v. *Wyman*, 467 F. 2d 226, certiorari denied, 411 U.S. 921 17
Russo v. *Kirby*, 335 F. Supp. 122 19
State v. *Grand Forks County*, 71 N.D. 355, 300 N.W. 827 14
Stewart v. *Butz*, 356 F. Supp. 1345, appeal pending, No. 73-1558, C.A. 6 19
Sullivan v. *Little Hunting Park*, 396 U.S. 229 13
Texas & Pacific Ry. v. *Rigsby*, 241 U.S. 33 13
Torez v. *Roberts*, No. 72-1300-Civ.-JE, S.D. Fla. (decided Sept. 20, 1972) 19
United States v. *California*, 297 U.S. 175 16
United States v. *California*, 328 F. 2d 729, certiorari denied, 379 U.S. 817 16
United States v. *Illinois*, 454 F. 2d 297, certiorari denied, 406 U.S. 918 16
United States v. *Mississippi*, 380 U.S. 128 16
United States v. *Texas*, 143 U.S. 621 16
Wyandotte Transp. Co. v. *United States*, 389 U.S. 191 13

Constitution, statutes and regulations:
United States Constitution, Eleventh Amendment 9, 11, 15-16, 17
Food Stamp Act of 1964, 78 Stat. 703 *et seq.*, as amended, 7 U.S.C. 2011 *et seq.*:
Section 3(m), 7 U.S.C. 2012(m) 5-6
Section 4(a), 7 U.S.C. 2013(a) 2, 5, 6
Section 4(c), 7 U.S.C. 2013(c) 2
Section 6(b), 7 U.S.C. 2015(b) 6
Section 7(d), 7 U.S.C. 2016(d) 6

Constitution, statutes and regulations—Continued
Food Stamp Act of 1964—Continued Page
Section 10(b), 7 U.S.C. 2019(b) 3, 5, 12, 15
Section 10(f), 7 U.S.C. 2019(f) 12
Section 15, 7 U.S.C. 2024 6
Section 16(a), 7 U.S.C. 2025(a) 6
7 C.F.R. 271.1(o)(5) 18
7 C.F.R. 271.6(d) 15
7 C.F.R. 271.6(d)(4) 7
7 C.F.R. 271.8(c)(1) 15
Miscellaneous:
FNS(FS) Instruction 732-14, Section V-D (1972) 4, 7
FNS(FS) Instruction 734-2 (1968):
Section VI-B 6
Section VI-C 3, 6, 15
Note, *Implying Civil Remedies from Federal Regulatory Statutes*, 77 Harv. L. Rev. 285 (1963) 13

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

The Solicitor General, on behalf of the Secretary of Agriculture, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Appendix A, *infra*) is reported at 479 F. 2d 1084. The opinion of

*The present filing should also be treated as our response to the pending petition for certiorari by the claimants, *Carter et al.* v. *Butz*, No. 73-5338, which we oppose

the district court (Appendix C, *infra*) is reported at 337 F. Supp. 563. The injunction of the district court is set forth in Appendix D, *infra*.

JURISDICTION

The judgment of the court of appeals (Appendix B, *infra*) was entered on May 29, 1973. On August 21, 1973, Mr. Justice Brennan extended the time for the Secretary of Agriculture to petition for a writ of certiorari to and including September 27, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether food stamp beneficiaries have an implied remedy against participating States for retroactive food stamp benefits withheld as a result of unaccountable failure by a State to carry out its issuance responsibilities under the Food Stamp Act.

2. Whether, in a suit by statutory beneficiaries to enforce implied monetary remedies under a cooperative federal-State program (Food Stamp Program), a State's sovereign immunity and immunity from suit in the federal courts is constructively waived by its voluntary participation in such program.

3. Whether the court of appeals correctly sustained the district court's decision not to extend the relief ordered against the federal government to a class.

STATUTES AND REGULATIONS INVOLVED

Sections 4(a) and (c) of the Food Stamp Act of 1964, as amended, 7 U.S.C. 2013(a) and (c) provide:

> (a) The Secretary [of Agriculture] is authorized to formulate and administer a food

> stamp program under which, at the request of the State agency, eligible households within the State shall be provided with an opportunity to obtain a nutritionally adequate diet through the issuance to them of a coupon allotment which shall have a greater monetary value than the charge to be paid for such allotment by eligible households. The coupons so received by such households shall be used only to purchase food from retail food stores which have been approved for participation in the food stamp program. Coupons issued and used as provided in this chapter shall be redeemable at face value by the Secretary through the facilities of the Treasury of the United States.
>
> (c) The Secretary shall issue such regulations, not inconsistent with this chapter, as he deems necessary or appropriate for the effective and efficient administration of the food stamp program.

Section 10(b) of the Act, 7 U.S.C. 2019(b), provides in pertinent part:

> The State agency of each participating State shall assume responsibility for the certification of applicant households and for the issuance of coupons * * *.

Section VI–C of FNS(FS) Instruction 734–2 (September 22, 1969), provides in pertinent part:

> *Emergency ATP Cards*—In emergency cases (newly certified households in immediate need, loss or theft of ATP's, etc.) immediately prepare those ATP's [authorization-to-purchase cards] which the household will need in order to participate before the next regular preparation of ATP's. * * *

Section V–D of FNS(FS) Instruction 732–14 (August 28, 1972) provides in pertinent part:

> *Limits of Adjustments After Decision.* Following the hearing decision, retroactive adjustments in favor of the household shall not be permitted * * *. This prohibition should not be construed to limit State Agencies in any way from issuing retroactive benefits to households from State monies. * * *

STATEMENT

Respondents Carter and Ankney, residents of Pennsylvania, are heads of households participating in the food stamp program. They (or, in the case of Katie Carter, her predecessor, Thomasena Tindall) brought this action in the district court on behalf of their households, and others similarly situated, to compel the Secretary of Agriculture and the Secretary of Welfare of the Commonwealth of Pennsylvania to grant them retroactive credits for food stamps which, through administrative error of the Pennsylvania Department of Public Welfare, had not been issued to them for the months of February 1971, and May, June and July, 1971, respectively. The district court entered a permanent, mandatory injunction requiring the Secretary of Agriculture and other federal defendants to provide retroactive credits to the named plaintiffs (App. D, *infra*). In his appeal to the Third Circuit, the Secretary of Agriculture argued that, in circumstances involving unaccountable State failure to make an emergency issuance of food stamps, as required by relevant federal instructions, the State, rather than the federal government, should provide

the retroactive credits required to make the plaintiffs whole (App. A, *infra*, p. 27, n. 10). The court of appeals rejected this position, affirming the district court's judgment that the liability in question be borne by the federal government, not the State government.

1. Under the Food Stamp Act, the Secretary of Agriculture is authorized to formulate and administer a food stamp program in the various States at the request of the States. Section 4(a) of the Act, 7 U.S.C. 2013(a). Pennsylvania requested to participate, and has been participating in the program since its inception in 1964. Once put into effect in a particular State, the State agency—usually the agency responsible for administration of the federal categorical assistance programs—has responsibility for the certification of qualifying households for participation in the program, and for the issuance of food stamps to such households, *i.e.*, the day-to-day administration of the program. Section 10(b), 7 U.S.C. 2019(b). In Pennsylvania, the State agency is the Department of Public Welfare.

The issuance of food stamps works as follows: Under instructions of the Food and Nutrition Service (the delegate of the Secretary of Agriculture), State agencies are authorized to mail "authorization-to-purchase" cards (ATP cards) to each participating household, which cards are used by the household to obtain their authorized allotment of food stamps each month from State issuance offices, or from commercial banks under contract with the State, upon payment by the household of its purchase requirement (pro-rated according to household size and income). 7 U.S.C.

522-071—73——2

2012(m); FNS(FS) Instr. 734–2, § VI–B. The stamps are redeemable at face value for food at participating retail food stores. 7 U.S.C. 2013(a), 2015(b). The "bonus" portion of the food stamps—the difference between the purchase requirement of a household and the face value of the stamps—is federally appropriated. 7 U.S.C. 2013(a), 2016(d), 2025(a).

The participating States are responsible for financing the costs of carrying out their administrative responsibilities under the Food Stamp Act, including the costs of issuing food stamps to eligible households. Section 15, 7 U.S.C. 2024.

Authorization-to-purchase (ATP) cards are normally prepared by computer print-outs. See FNS(FS) Instruction 734–2 (Sept. 22, 1969). Because these cards may sometimes not be received by households when they should be, on account of loss, theft or other reason, the Food and Nutrition Service developed a remedial procedure. Section VI–C of FNS(FS) Instruction 734–2 requires State agencies to make an emergency issuance of cards in the event that the originals are not received. This instruction states: "*Emergency ATP Cards*—In emergency cases (newly certified households in immediate need, loss or theft of ATP's, etc.) [the State agency shall] immediately prepare those ATP's which the household will need in order to participate before the next regular preparation of ATP's." Emergency ATP cards would normally be prepared manually. The emergency procedure requires that a participating household which does not

receive its regularly scheduled ATP card[1] promptly notify the State agency of this fact, and that the State agency promptly implement a special issuance (which is only permitted before the next scheduled issuance).

2. In this case the Carter (Tindall) household did not receive its regular February 1971 ATP card, because of a computer breakdown in Harrisburg, Pennsylvania. The Ankney household did not receive its ATP cards for May, June and July 1971, because of an incorrect address (App. A, *infra*, p. 25; Stipulation, p. 2). In both cases the households brought their problem to the attention of the Pennsylvania State agency (Pennsylvania Department of Public Welfare) in a timely manner; nevertheless, the State agency unaccountably failed to implement the emergency issuance procedure (App. A, *infra*, p. 26). In the district court the State agency officials expressly stipulated that the failure of both households to receive their food stamps was "because of administrative error on the part of the Department of Public Welfare" (Stipulation, p. 2). The plaintiffs sought retroactive credit, to make up the losses, at an administrative hearing before the Pennsylvania State agency. Their claims were denied on the basis of FNS(FS) Instruction 732-14, § IV-D (now § V-D), which prohibits the granting of

[1] ATP cards are mailed by State agencies either monthly or semi-monthly. See 7 C.F.R. 271.6(d)(4). In Pennsylvania the issuance is monthly.

retroactive food stamp credit at *federal* expense following a hearing decision.[2]

3. Plaintiffs then brought their action in the district court, against both federal and State defendants, to compel payment of the retroactive credit necessary to make them whole (amounting to $38 in the Tindall or Carter case, and $126 in the Ankney case). The Secretary of Agriculture urged that the one month period for implementing the emergency issuance procedure (during which the bonus would be paid by the federal government) was reasonable (Tr. 39–40), and necessary in order "to get the food stamps to the people at the time they are needed" (Tr. 44); and that, in circumstances involving unaccountable State failure to implement the emergency procedure, the State government rather than the federal government should be liable for the retroactive credits in question (Tr. 42–43, 71, 75; App. A, *infra*, p. 26). The district court acknowledged this argument, noting that "if the State has to pay for their laxity, maybe it would discourage it" (Tr. 44); but nevertheless ruled that the federal government should provide the retroactive credits, in view of the State's contention "that it has no appropriations for bearing the cost of the stamps in

[2] A clarifying amendment of August 28, 1972 states that "[t]his prohibition should not be construed to limit State Agencies in any way from issuing retroactive benefits to households from State monies."

arrears, but the federal government does" (App. C, *infra*, p. 38).[3]

4. The federal government appealed, urging that under the implied remedy doctrine of *Sullivan* v. *Little Hunting Park*, 396 U.S. 229, and related cases, the States rather than the federal government should be liable for unaccountable State failure to carry out its issuance responsibilities under the Food Stamp Act. In answer to the Commonwealth's argument of State sovereign immunity under the Eleventh Amendment, the Secretary urged that such immunity had been waived as to claims under the Food Stamp Act, by virtue of the Commonwealth's voluntary request to participate in the food stamp program, citing *Parden* v. *Terminal Ry. of Alabama*, 377 U.S. 184.

The court of appeals, while recognizing that it was "dealing with the area of judicial implication of appropriate remedies to redress federal statutory rights" (App. A, *infra*, p. 29), held that "[w]hen considering whether to construe the Act as permitting the implication of a remedy against the state rather than Federal Government we cannot disregard the fact that Congress has appropriated funds for the payment of

[3] The form of retroactive relief ordered by the district court—forward adjustment of the lost benefits toward future purchase requirements—is considered the best form of such relief, since, as pointed out by the district court (App. C, *infra*, p. 40), it eliminates the possibility of a black market in food stamps which would be occasioned by the granting of additional stamps.

the benefits in question, while the states have not" (*ibid.*). The court further held (*ibid.*):

> This is not to suggest that it would have been beyond the power of Congress to require as a condition to the states' participation in the program a waiver of sovereign immunity to the extent of retroactive benefits. See *King* v. *Smith, supra* [392 U.S. 309]; compare *Jordan* v. *Weaver*, 472 F. 2d 985, 993–94 (7th Cir. 1973) with *Rothstein* v. *Wyman*, 467 F. 2d 226, 238 (2d Cir. 1972). But nothing in the Act suggests any such congressional intention. See *Employees of the Department of Public Health & Welfare, State of Missouri* v. *Department of Public Health & Welfare, State of Missouri*, 41 U.S.L.W. 4493 (U.S. April 18, 1973).

On this basis, the court of appeals affirmed the judgment of the district court, holding the federal government liable and the State not liable (App. A, *infra*, p. 31). The court of appeals also affirmed the district court's decision not to extend its relief to a class (*ibid.*).

On August 27, 1973, respondents Carter and Ankney (plaintiffs and cross-appellants below) filed a petition for certiorari, seeking review of the court of appeals judgment insofar as it sustained the district court's refusal to extend the relief ordered against the federal government to a class.

REASONS FOR GRANTING THE WRIT

This petition of the Secretary of Agriculture presents two issues. The first is whether the Food Stamp Act of 1964 authorizes an implied monetary remedy by food stamp beneficiaries against participating

States for unaccountable failure of the State to carry out its responsibility to issue food stamps on time. The second is whether, if such remedy exists, a State's sovereign immunity and immunity from suit in the federal courts under the Eleventh Amendment is constructively waived by its voluntary participation in the food stamp program. Respondents Carter and Ankney seek certiorari on a third issue, whether the court of appeals erred in sustaining the district court's decision not to extend the relief ordered against the federal government to a class. See *Carter* v. *Butz*, No. 73–5338.[4]

The issues raised by the Secretary have nationwide significance; their resolution by this Court will have a direct and important impact on the effective operation of the nation's Food Stamp program, a cooperative federal-State venture funded by the federal government and administered by participating States which is designed to benefit over 12 million low-income persons. The basic question is whether the federal courts may devise an appropriate monetary remedy which would have the effect of preventing the program from breaking down at the State level. While the present case involves less than $200, it is typical of many others throughout the nation, each involving unaccountable State failure to issue stamps on time. The stamps must be issued on time if the nutritional purpose of the Program is to be served. Unfortunately, a significant degree of laxity in the State administration has become apparent.

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[4] The Secretary opposes granting of certiorari on that issue, for reasons set forth *infra*, pp. 17–18.

1. On the issue of implied relief against the State (here Pennsylvania), the instructions implementing the Food Stamp Act are clear in requiring the State to make a timely (within the month) emergency issuance when food stamps are not originally received. The State in this case unaccountably failed to make an emergency issuance. If it had made an emergency issuance the plaintiffs (Carter and Ankney households) would have received their food stamps on time, when they were needed, and the federal government would have paid the bonus portion as a matter of course. The State offered no explanation for its laxity, and does not contest the propriety of the emergency issuance procedure.

The Act expressly provides that participating States "shall assume responsibility * * * for the issuance of coupons." 7 U.S.C. 2019(b). That responsibility was voluntarily assumed. It was not exercised. In these circumstances, judicial relief against the State for the retroactive portion of unissued stamps may be implied, to enforce the State issuance responsibility expressly set forth in the Act and implementing instructions. No other practicable remedy to cure State laxity in the issuance process is available.[5]

In suits for pecuniary relief based on violation of federal statutes which lack any express authorization for a monetary remedy, this Court has authorized such relief where, in its view, monetary relief was

[5] A total cut-off of food stamps under 7 U.S.C. 2019(f) is not considered practicable, particularly from the beneficiaries' viewpoint.

necessary to effectuate the congressional policy underpinning the substantive provisions of the statute. *Sullivan* v. *Little Hunting Park,* 396 U.S. 229, 238–240 (Civil Rights Act of 1866); *Wyandotte Transp. Co.* v. *United States,* 389 U.S. 191, 201–204 (Rivers and Harbors Act of 1899); *J. I. Case Co.* v. *Borak,* 377 U.S. 426, 433–434 (Securities and Exchange Act of 1934); *Texas & Pacific Ry.* v. *Rigsby,* 241 U.S. 33, 39–40 (Safety Appliance Act). See also *Euresti* v. *Stenner,* 458 F. 2d 1115, 1118 (C.A. 10) (Hill-Burton Act); and Note, *Implying Civil Remedies from Federal Regulatory Statutes,* 77 Harv. L. Rev. 285 (1963).

In the *Sullivan* case the Court reaffirmed the principle expressed a half century ago in *Rigsby, supra* (396 U.S. at 239):

> A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover the damages from the party in default is implied * * *.

In *Borak* the Court considered it to be "the duty of the courts to be alert to provide such remedies as are necessary to make effective the congressional purpose." 377 U.S. at 433.

In this case we suggest that the plaintiffs have an implied remedy against the States. Such remedy is necessary to effectuate the States' voluntarily-assumed responsibility under the Act and implementing regulations and instructions for timely and proper is-

suance of food stamps.[6] Lack of an appropriate judicial remedy to enforce State responsibility will only encourage additional State laxity.

2. The applicability of State sovereign immunity depends on whether suits to enforce rights under cooperative federal-State programs are governed by *Parden* v. *Terminal Ry. of Alabama*, 377 U.S. 184 (holding that a State constructively waives its sovereign immunity by voluntarily entering into activities subject to Congressional regulation—there, operation of an interstate railroad); or by *Employees* v. *Missouri Public Health Dept.*, 411 U.S. 279 (holding that States are not subject to double damages in the federal courts under the Fair Labor Standards Act for failure to pay overtime compensation to State employees). The court of appeals held that sovereign immunity was applicable, citing *Employees of Missouri*.

In our view, *Employees of Missouri* does not govern here. That case dealt with federal regulation of traditional governmental functions of a State—the payment of wages to State employees. The States never consented to such regulation. By contrast, the present case involves a federal welfare program for the public

[6] The court of appeals apparently considered that any implied remedy against the State was foreclosed by the fact that the Food Stamp Act calls generally for federal funding of the bonus portion of food stamps, and State funding of administrative costs (App. A, *infra*, p. 29). We consider this to be merely one out of many factors relevant in determining whether the State should be liable where the program has broken down as a result of unaccountable State failure to carry out its express issuance responsibilities. Cf. *State* v. *Grand Forks County*, 71 N.D. 355, 362–363, 300 N.W. 827, 831; *Biakanja* v. *Irving*, 49 Cal. 2d 647, 320 P. 2d 16.

at large, where the States have expressly requested to participate for the benefit of eligible citizens within each State, on the express condition that they administer the program within the State in conformity with reasonable federal requirements. See *King* v. *Smith*, 392 U.S. 309; 7 U.S.C. 2019(b); 7 C.F.R. 271.6(d), 271.8(c)(1); FNS(FS) Instr. 734–2, § VI–C. To the extent that the States fail to comply with the requirements of the statute and reasonable implementing regulations, they should be taken as having constructively *waived* their sovereign immunity from appropriate federal remedies designed to effectuate their expressly-assumed administrative responsibilities, notwithstanding the lack of an express or implied condition in the Act for waiver of sovereign immunity. The governing principles here were restated by this Court in *Parden* v. *Terminal Ry. of Alabama, supra*, 377 U.S. at 196:

> Where a State's consent to suit is alleged to arise from an act not wholly within its own sphere of authority but within a sphere—whether it be interstate compacts or interstate commerce—subject to the constitutional power of the Federal Government, the question whether the State's act constitutes the alleged consent is one of federal law. * * *
>
> Our conclusion that this suit [under the Federal Employers' Liability Act against an interstate railroad operated by Alabama] may be maintained is in accord with the common sense of this Nation's federalism. A State's immunity from suit by an individual without its consent has been fully recognized by the Eleventh

> Amendment and by subsequent decisions of this Court. But when a State leaves the sphere that is exclusively its own and enters into activities subject to congressional regulation, it subjects itself to that regulation as fully as if it were a private person or corporation. * * *[7]

Employees of Missouri quite obviously did not deal with any constructive waiver by the State of its immunity, as this Court recognized (411 U.S. at 285). Hence, the controlling reliance placed upon that case by the Third Circuit in *Carter* v. *Butz* is misplaced.[8]

This Court has granted certiorari in a related case involving waiver of State sovereign immunity under the categorical federal assistance programs. See *Jordan* v. *Weaver*, 472 F. 2d 985 (C.A. 7), certiorari granted *sub nom. Edelman* v. *Jordan*, No. 72-1410,

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[7] It is unimportant whether the State conducts the activity in question in its "sovereign" or in its "private" capacity. *United States* v. *California*, 297 U.S. 175, 183 (Safety Appliance Act). Cf. *Indian Towing Co.* v. *United States*, 350 U.S. 61, 65 (rejecting "non-governmental—governmental" distinction as inherently unsound).

[8] The Secretary also argued below that a State's sovereign immunity is not available against the federal government. See *United States* v. *Mississippi*, 380 U.S. 128, 140–141; *United States* v. *California*, 297 U.S. 175; *United States* v. *Texas*, 143 U.S. 621, 646; *United States* v. *Illinois*, 454 F. 2d 297, 300–301 (C.A. 7), certiorari denied, 406 U.S. 918; *United States* v. *California*, 328 F. 2d 729 (C.A. 9), certiorari denied, 379 U.S. 817. Here the State's sovereign immunity argument is being used against the federal government, since the ultimate question in these cases is whether unaccountable mistakes of the State government are to be paid for by the State government or by the federal government. The court of appeals did not address this argument.

June 11, 1973, involving asserted constructive waiver of State sovereign immunity in the context of retroactive welfare benefits, where the court of appeals relied on *Parden* v. *Terminal Ry. of Alabama, supra.*[9] The present case, involving a claim of State sovereign immunity in the context of the Food Stamp program, could appropriately be heard in conjunction with *Jordan.*[10]

3. The court of appeals declined to extend the relief ordered against the federal government in this case to a class. That disposition was entirely correct. In *Bermudez* v. *U.S. Department of Agriculture,* 348 F. Supp. 1279 (D. D.C.), appeal pending, No. 72-2138, C.A.D.C., the district court ordered nationwide class relief against the federal government on the same

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[9] A contrary result on the immunity issue was reached in *Rothstein* v. *Wyman,* 467 F. 2d 226, 236-238 (C.A. 2), certiorari denied, 411 U.S. 921, where, however, the court's reversal of a grant of retroactive AABD and AFDC benefits against the State was also justified on the ground that, in the particular circumstances of that case, such relief would not comport with a fair balance of the equities and would not assist the effectuation of federal welfare policies, 467 F. 2d at 234-236.

[10] We would add that State sovereign immunity is hardly a panacea for effective operation of a vast multitude of cooperative federal-state social programs. In this regard it might be noted that *Hans* v. *Louisiana,* 134 U.S. 1, which "extended" the Eleventh Amendment to suits against a State by its own citizens, was decided in a context having nothing to do with a federal-state program, and many years before the legislative period of the 1930s, when most of the present federal-state social programs were conceived. Likewise, *Employees of Missouri* did not deal with a federal-state social program, but, rather, with a direct federal regulatory program, as applied to State employees.

types of claims at issue in *Carter*. The nationwide class relief in *Bermudez* was stayed by the court of appeals on January 9, 1973, pending the federal government's appeal. If the court of appeals affirms the district court's judgment, the question of class relief in *Carter* will be mooted. On the other hand, that issue will be avoided, as a practical matter, if this Court grants certiorari to review the merits in this case.[11]

4. The *Bermudez* case, however, highlights the importance of the other issues presented here. In that case, the plaintiffs complained, not only of unaccountable State failure to make emergency issuances of food stamps (in cases of inadvertent terminations), but also unaccountable State failure to keep beneficiaries on food stamp benefits pending a hearing (in cases of intentional termination), in violation of the implementing regulation. See 7 C.F.R. 271.1(o)(5). Nevertheless, the district court held that the States (New York and Connecticut in that case) could not be held liable and, accordingly, denied the federal government's plea that they were indispensable parties. If that ruling were sustained, the result would be that States could, with impunity, disregard any administrative regulation, or even a statutory command, under the Food Stamp program.[12]

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[11] Petitioners Carter and Ankney do not specify in their petition whether they seek nationwide or statewide (Pennsylvania) class relief.

[12] *Bermudez* was argued in the court of appeals on February 26, 1973, and a decision is presumably to be expected shortly.

A decision by this Court in the present case will of course control all pending litigation, including the *Bermudez* case and a substantial number of similar claims in the lower federal courts for retroactive food stamp credits arising out of unaccountable State failure to carry out their issuance responsibilities: *e.g., Stewart* v. *Butz,* 356 F. Supp. 1345 (W.D. Ky.), appeal pending, No. 73–1558, C.A. 6; *Howard* v. *Department of Agriculture, No.Civ.*-v972–433, W.D. N.Y.; *Goldenson* v. *Edelman,* No. 72 C 2838, N.D. Ill.; *Cruz* v. *Butz,* No. C–4267, D. Colo.; *Viani* v. *Department of Agriculture,* No. C–72–1273 (GBH), N.D. Calif.; *Warren* v. *Bonin,* No. 72–3290, E.D. La.; *Chandler* v. *Butz,* No. C73–716, N.D. Ohio. Several of these cases have been brought as class actions. Related cases in which federal officials were *not* made parties include: *Lidie* v. *California,* 478 F. 2d 552 (C.A. 9); *Russo* v. *Kirby,* 335 F. Supp. 122 (E.D. N.Y.); *Torez* v. *Roberts,* No. 72–1300-Civ.-JE, S.D. Fla. (decided Sept. 20, 1972); *Harrell* v. *Harder,* No. 13,800, D. Conn. (decided June 13, 1973).

In order to avoid inconsistent lower court judgments, both individual and class, and to permit a uniform nationwide policy on payment of retroactive food stamp benefits as soon as possible, including implied retroactive food stamp relief against the State or federal government, and constructive waiver of State sovereign immunity, we urge the Court to grant review in this case, the only one presently ripe for review, and a case in which the issues are concretely defined on a fully developed record.

CONCLUSION

For the foregoing reasons the present petition for a writ of certiorari should be granted, and the petition in No. 73–5338 denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
IRVING JAFFE,
Acting Assistant Attorney General.
LEONARD SCHAITMAN,
MICHAEL KIMMEL,
Attorneys.

SEPTEMBER 1973.

APPENDIX A

United States Court of Appeals for the Third Circuit

Nos. 72–1239 and 72–1288

KATIE CARTER, ON BEHALF OF THE HOUSEHOLD OF THOMASENA TINDALL, DECEASED; BARBARA C. ANKNEY, INDIVIDUALLY AND ON BEHALF OF HER HOUSEHOLD AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, APPELLANTS IN NO. 72–1239

v.

EARL L. BUTZ, INDIVIDUALLY AND IN HIS CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF AGRICULTURE; EDWARD J. HEKMAN, INDIVIDUALLY AND IN HIS CAPACITY AS ADMINISTRATOR OF AGRICULTURE'S FOOD AND NUTRITION SERVICE; UNITED STATES DEPARTMENT OF AGRICULTURE, APPELLANTS IN NO. 72–1288

AND

HELENE WOHLGEMUTH, SECRETARY OF WELFARE OF THE COMMONWEALTH OF PENNSYLVANIA; EDWARD KALBERER, EXECUTIVE DIRECTOR OF THE ALLEGHENY COUNTY BOARD OF ASSISTANCE; DEPARTMENT OF PUBLIC WELFARE AND COMMONWEALTH OF PENNSYLVANIA

(D.C. Civil Action 71–847)

Appeal from the United States District Court for the Western District of Pennsylvania

Argued March 6, 1973

Before GIBBONS and HUNTER, *Circuit Judges*, and MUIR, *District Judge*

Michael A. Nemec, Esq., Neighborhood Legal Services Association, 310 Plaza Building, 535 Fifth Avenue, Pittsburgh, Pennsylvania 15219, Attorneys for Appellants in No. 72–1239; *Harlington Wood, Jr.,* Acting Assistant Attorney General, *Richard L. Thornburgh,* United States Attorney, *Alan S. Rosenthal, Michael Kimmel,* Attorneys, Department of Justice, Washington, D.C. 20530, Attorneys for the Government Appellants in No. 72–1288; *J. Shane Creamer,* Attorney General, *Barry A. Roth,* Assistant Attorney General, *Marx S. Leopold,* Assistant Attorney General, Room 323, Health & Welfare Building, Harrisburgh, Pennsylvania 17120, Attorneys for Secretary of Welfare and Commonwealth of Pennsylvania; [Appellees] in No. 72–1288.

OPINION OF THE COURT

(Filed May 29, 1973)

GIBBONS, *Circuit Judge:* In this action heads of households who were beneficiaries of the federal food stamp program sought relief in the district court against the federal Secretary of Agriculture[1] and

[1] This court substituted the present Secretary of Agriculture, Earl L. Butz for the former Secretary Clifford M. Hardin. Edward J. Hekman, Administrator of the Food and Nutrition Service of the Department of Agriculture and the United States Department of Agriculture were also joined as defendants. Hereinafter the above will be referred to as the federal defendants.

the Pennsylvania Welfare Department[2] for the deprivation of food stamps which resulted from administrative errors committed by officials of the Welfare Department. The district court judgment provided that the arrearages in food stamp allotments be cured by a forward adjustment of the amount of purchase discount which would be allowed to each plaintiff in the purchase of future monthly food stamps allotments. The effect of this judgment was to grant full relief to the plaintiffs at the expense of the Federal Government. The plaintiffs sought class action treatment, which the district court declined. Plaintiffs appeal from the adverse class action determination. The federal defendants cross appeal from the judgment imposing the expense of the forward adjustment on the Federal Government rather than on the Commonwealth of Pennsylvania. Neither the federal nor the state defendants contend that it was inappropriate to grant some form of relief, against someone, to the plaintiffs.

Under the Food Stamp Act of 1964[3] (the Act) and implementing regulations[4] the Food and Nutrition Service of the Department of Agriculture administers a program under which, at the request of the states, low income households within the state

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[2] Also joined with the Pennsylvania Welfare Department as defendants were Helene Wohlgemuth, Secretary of Welfare of the Commonwealth of Pennsylvania and Edward Kalberer, Executive Director of the Allegheny County Board of Assistance. Hereinafter the above will be referred to as the state defendants.

[3] 78 Stat. 703 (1964), as amended, 84 Stat. 2048 (1971), 7 U.S.C. §§ 2011–2025. *See also* section 411 of the Social Security Amendments of 1972, 86 Stat. 1329, 1491–92, 7 U.S.C. § 2012(e) (Supp. 1972), as amended.

[4] 7 C.F.R. Pts. 270–274.

are enabled to purchase at a discount from their redeemable value, food stamps which may be used to obtain a nutritionally adequate diet. The amount such householders pay for the food stamps is determined under a sliding scale dependent upon the household's income. Eligibility of certain households, such as welfare recipients[5] is determined at the federal level. Eligibility of other households is determined by the states, under uniform national income and resource standards set forth in the Act and federal regulations.[6] Under the Act, state agencies are responsible for certification of qualifying households, and are also responsible for the issuance of food stamps. 7 U.S.C. § 2019(b); 7 C.F.R. § 270.3(b). Instructions of the Food and Nutrition Service permit the state agencies to perform the certification responsibility by mailing to eligible households at a specified time twice each month authorization to purchase cards (ATP cards) which disclose the household's "purchase requirement." The "purchase requirement" is the percentage of the face amount of redeemable value which the householder must pay to the issuing state agency for the stamps. The issuing state agency is usually a commercial bank, which deposits the "purchase requirement" to the credit of the United States Treasury. The food stamps are redeemable for eligible food items at face value at participating retail food stores. The stores collect the face value in money at a bank, which in turn is reimbursed at face value by the Treasury through the Federal Reserve System. Thus, the amount of the discount is borne by the Federal Government. While the Federal Government bears the cost of the discount, with certain limited exceptions

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[5] *See* 7 C.F.R. § 271.3(b).

[6] *See* 7 U.S.C. §§ 2014, 2019(e)(1); 7 C.F.R. § 271.3(c).

the participating states are responsible for financing the costs of carrying out their administrative duties under the Act, including the administrative cost of issuing food stamps to eligible households.[7]

The purpose of the food stamp program is the assurance of a nutritionally adequate diet. This purpose would be defeated by issuing procedures which would tend to place in the hands of eligible householders more food stamps than could be redeemed for food in a relatively short period. To insure that the food stamps will be used by householders for the intended purpose, the ATP cards are issued periodically and are valid only for short intervals; usually no longer than one-half month. If, through an administrative error at the state level, an ATP card does not reach a householder during a given eligibility period, that householder is unable to purchase the stamps available during that interval, and thereby loses his discount for that period. In this case the plaintiffs, eligible householders, did not receive ATP Cards because of a computer breakdown (Tindall) or an incorrect address (Ankney). In both of these cases nonissuance was due solely to an administrative error of the Pennsylvania Department of Public Welfare.

The Food and Nutrition Service has issued instructions which deal with inadvertent termination or reduction of food stamp benefits.[8] Food and Nutrition Service Instruction 734–2 authorizes emergency issuance of ATP cards, in cases where through no fault of their own eligible householders may not have received

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[7] 7 U.S.C. § 2024; 7 C.F.R. §§ 271.1(h), 271.2.

[8] Purposeful termination or reduction, under a 1971 amendment to the Act and implementing regulations, requires a fifteen-day notice of adverse action and a fair hearing. Section 10(e)(6), 7 U.S.C. § 2019(e)(6); 7 C.F.R. §§ 271.1(m), 271.1(o); Food and Nutrition Service Instruction 732–14.

them, before the next regularly scheduled ATP card issuance. Under section VI–C of this instruction state agencies are authorized to prepare manually replacement cards for those not received at the normal time, thereby permitting an eligible household to participate in the program in the current eligibility period. The participating household must promptly notify the state agency that it has not received its regularly scheduled ATP card, since, consistent with the nutritional purposes of the statute, the emergency issuance is permitted only prior to the next scheduled issuance. Appellants in this case, the district court found, did make timely application to the appropriate officials of the Pennsylvania Welfare Department, which compounded the administrative foulup delivery of the ATP cards by failing to make timely emergency issuance.

The federal defendants contend that while they have no objection to giving relief to eligible householders who have been deprived of benefits through no fault of their own, the relief should be at the expense of the Commonwealth of Pennsylvania, not at the expense of the United States. They urge that the applicable administrative regulations and instructions establish a thirty-day statute of limitations on federal liability. But because the states are under a general statutory obligation to follow administrative regulations and the instructions of the Federal Nutrition Service,[9] they urge, and in the instant cases failed to do so, the same regulations and instructions provide the predicate for imposing on the states a liability which does not otherwise appear. The state defendants contend that the Act does not authorize a thirty-day statute of limitations, that the regulations in force at the time of the

[9] *See* 7 U.S.C. § 2013(c).

events in issue do not specify such a period, that there are no state appropriations for the payment of benefits to food stamp eligibles, and that imposition of liability on the Commonwealth is prohibited by its sovereign immunity.

Since both the state and the federal defendants concede that the plaintiffs are entitled to relief from some source [10] we are not concerned with an issue over the statutory right of the recipients. *Cf. Graham v.*

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[10]The federal defendants stated:

"We do not take the position that the food stamp beneficiaries here involved have no remedy at all. Our position is that, assuming that they did not receive their ATPs, that they in fact made a timely request for reissuance to the State agency, and that the latter failed to implement the emergency procedures, the Food Stamp Act and implementing regulations at least implicitly require that the remedy be provided by the State agency, not the federal government." Brief for the Secretary of Agriculture at 23.

The state defendants admit that those who qualify have a right to receive the food stamps.

"II. FOOD STAMP BENEFITS ARE STATUTORY ENTITLEMENT TO THOSE WHO MEET THE STANDARDS OF ELIGIBILITY.

In *Goldberg v. Kelly*, 397 U.S. 254 (1970) it was determined that welfare benefits are a matter of statutory entitlement for persons qualified to receive them. In the lower court opinion, District Judge Dumbauld indicated at page 7 of his opinion, we agree with other courts that have passed upon the issues that the right to receive benefits under the food stamp program is a statutory entitlement. In the instant case, the entitlement originates in 7 U.S.C. § 2013(A):

'The Secretary is authorized to formulate and administer a food stamp program under which, at the request of the State agency, eligible households within the State shall be provided with an opportunity to obtain a nutritionally adequate diet through the issuance to them of a coupon allotment.'" Brief for Appellee at 6.

Richardson, 403 U.S. 365 (1971); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *King v. Smith*, 392 U.S. 309 (1968). The only issue is, as between the federal and state governments, which party should be financially responsible for the remedy implied from conceded statutory eligibility. Under the Act, generally speaking, the Federal Government pays for benefits, 7 U.S.C.§§ 2013(a), 2016(d), while the states pay for a portion of administrative costs. 7 U.S.C. §§ 2019(b), 2024(a). The Commonwealth may be held liable to the Federal Government for gross negligence or fraud on the part of its agencies in the certification of applicant households by the face amount of food stamps issued as a result of such fraud in excess of the household's proper eligibility. 7 U.S.C. § 2019(g). The Secretary has a general rulemaking authority under the Act. 7 U.S.C. § 2014(c). He has issued regulations implementing 7 U.S.C. § 2019(g), which provide for state financial liability to the Federal Government when because of errors by the states, the Federal Government has been charged with coupons which should never have been issued. *See* 7 C.F.R. § 271.7. The aim of 7 U.S.C. § 2019(g) and of 7 C.F.R. § 271.7 is to provide indemnity to the Federal Government for *additional* expense which it has incurred as a result of such errors. In this case no *additional* expense is involved. Indeed if we were to accept the position of the federal defendants the Federal Government would incur reduced rather than additional expense.

The argument in favor of imposing liability on the states for the amount of benefits which must be made available later than the normal eligibility period is that such liability would provide an incentive to the states to police strictly the administration of the food stamp program. Such policing by the states would reenforce the federal purpose of having a limited

number of food stamps in the hands of recipients in a given period, and thereby of assuring that they would be used for sound nutritional purposes rather than sold or traded. But neither the Act nor the regulations in effect when plaintiffs were deprived of benefits provide specifically for the imposition of such an incentive-penalty upon the states. Thus we are dealing with the area of judicial implication of appropriate remedies to redress federal statutory rights. *See, e.g., Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969); *J. I. Case Co. v. Borak*, 377 U.S. 426 (1964); *cf. Bell v. Hood*, 327 U.S. 678 (1946). When considering whether to construe the Act as permitting the implication of a remedy against the state rather than Federal Government we cannot disregard the fact that Congress has appropriated funds for the payment of the benefits in question, while the states have not. This is not to suggest that it would have been beyond the power of Congress to require as a condition of the states' participation in the program a waiver of sovereign immunity to the extent of retroactive benefits. *See King v. Smith, supra; compare Jordan v. Weaver*, 472 F. 2d 985, 993–94 (7th Cir. 1973) *with Rothstein v. Wyman*, 467 F. 2d 226, 238 (2d Cir. 1972). But nothing in the Act suggests any such congressional intention. *See Employees of the Department of Public Health & Welfare, State of Missouri v. Department of Public Health & Welfare, State of Missouri*, 41 U.S.L.W. 4493 (U.S. April 18, 1973).[11]

[11] The argument for imposing liability on the Commonwealth would be that in allowing the thirty-day period for the issuance of ATP cards to elapse, the Commonwealth breached a duty to the recipients and would be liable to them on a negligence theory. We find no indication in the legislation that Congress intended to vest in the administrator the power to create by rule such a cause of action against a sovereign state.

Moreover, the remedy fashioned by the district court, forward adjustment of the price of food stamps to the deprived recipients, is consistent with the federal nutritional purposes. Presumably the plaintiff householders spent money for food in lieu of stamps in the period during which they did not receive their ATP cards. They are not, under the judgment of the court, being given additional stamps beyond their normal needs, which might find their way into non-nutritional uses. They are merely being given an opportunity to make up the cash discount of which they were deprived. That remedy seems to us entirely consistent with both the purposes and the language of the Act. An instruction of the Federal Nutritional Service, FNS Instruction 732–14 IV–D, prohibits retroactive food stamp adjustments in favor of food stamp recipients who, in fair hearings on reduction or termination of benefits, have prevailed. The Instruction states:

> "Past food consumption cannot be increased or otherwise altered. Therefore, following the hearing decision, retroactive adjustments in favor of the household shall not be permitted."

The Federal Nutritional Services recognizes, however, that some adjustment is appropriate, for the same instruction was amended on August 28, 1972 to provide:

> "This prohibition should not be construed to limit State Agencies in any way from issuing retroactive benefits to households from state monies." Instruction V–D.

Forward adjustment rather than retroactive payment of benefits from any source, state or federal, is more consistent with the the federal purpose of assuring current use of the stamps for nutritional purposes.

Those courts, in addition to the district court in this case, which have considered the matter have concluded as much. *Stewart v. Butz,* Civil No. 7424–G (W.D. Ky., March 13, 1973); *Bermudez v. United States Department of Agriculture,* 348 F. Supp. 1279 (D.D.C. 1972), *appeal pending,* No. 72–2138 (D.C. Cir.); *Russo v. Kirby,* 335 F. Supp. 122 (E.D.N.Y. 1971).

There remains for consideration the adverse class action determination. In quite similar circumstances other district courts have concluded that the action should be maintained as a class action pursuant to Fed. R. Civ. P. 23(b)(2). *See Stewart v. Butz, supra; Bermudez v. United States Department of Agriculture, supra; Russo v. Kirby, supra.* In this case the district court concluded that the disparate factual circumstances of class members, especially differences in the amount of discount for which they were eligible, made a class action undesirable. The court also concluded that the precedential value of its decision would render a judgment in favor of the class unnecessary. While we might well have decided otherwise, we conclude that the class action determination was within the range of discretion permitted by rule 23.

The judgment of the district court will be affirmed. Each party to bear its own costs.

A True Copy: Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX B

United States Court of Appeals for the Third Circuit

Nos. 72-1239 and 72-1288

KATIE CARTER, ON BEHALF OF THE HOUSEHOLD OF THOMASENA TINDALL, DECEASED; BARBARA C. ANKNEY, INDIVIDUALLY AND ON BEHALF OF HER HOUSEHOLD AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, APPELLANTS IN NO. 72-1239

v.

EARL L. BUTZ, INDIVIDUALLY AND IN HIS CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF AGRICULTURE; EDWARD J. HEKMAN, INDIVIDUALLY AND IN HIS CAPACITY AS ADMINISTRATOR OF AGRICULTURE'S FOOD AND NUTRITION SERVICE; UNITED STATES DEPARTMENT OF AGRICULTURE, APPELLANTS IN NO. 72-1288

AND

HELENE WOHLGEMUTH, SECRETARY OF WELFARE OF THE COMMONWEALTH OF PENNSYLVANIA; EDWARD KALBERER, EXECUTIVE DIRECTOR OF THE ALLEGHENY COUNTY BOARD OF ASSISTANCE; DEPARTMENT OF PUBLIC WELFARE AND COMMONWEALTH OF PENNSYLVANIA

(D.C. Civil Action No. 71-847)

On Appeal from the United States District Court for the Western District of Pennsylvania

Present: GIBBONS and HUNTER, *Circuit Judges,* and MUIR, *District Judge.*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed January 18, 1972, be, and the same is hereby affirmed. Each party to bear its own costs.

ATTEST:

THOMAS F. QUINN,
Clerk.

MAY 29, 1973.

Certified as a true copy and issued in lieu of a formal mandate on June 20, 1973.

Test: THOMAS F. QUINN, Clerk, United States Court of Appeals for the Third Circuit.

APPENDIX C

In the United States District Court for the Western District of Pennsylvania

Civil Action No. 71–847

THOMASENA TINDALL, INDIVIDUALLY AND ON BEHALF OF HER HOUSEHOLD; BARBARA C. ANKNEY, INDIVIDUALLY AND ON BEHALF OF HER HOUSEHOLD AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS,

v.

CLIFFORD M. HARDIN, INDIVIDUALLY AND IN HIS CAPACITY AS SECRETARY OF THE UNITED STATES DEPARTMENT OF AGRICULTURE; EDWARD J. HEKMAN, INDIVIDUALLY AND IN HIS CAPACITY AS ADMINISTRATOR OF AGRICULTURE'S FOOD AND NUTRITION SERVICE; UNITED STATES DEPARTMENT OF AGRICULTURE: HELENE WOHLGEMUTH, SECRETARY OF WELFARE OF THE COMMONWEALTH OF PENNSYLVANIA; EDWARD KALBERER, EXECUTIVE DIRECTOR OF THE ALLEGHENY COUNTY BOARD OF ASSISTANCE; DEPARTMENT OF PUBLIC WELFARE OF THE COMMONWEALTH OF PENNSYLVANIA, DEFENDANTS.

OPINION

DUMBAULD, J.: Legal scholars have often observed, that both in the Roman law and common law systems, the remedy or specific type of action historically came first. Not until later did legal philosophers analyze and classify the types of substantive rights

recognized by the law, and endeavor to devise appropriate remedies to enforce them. In the more advanced and sophisticated stage of legal development, with primary emphasis upon the substantive rights, the maxim *ubi jus ibi remedium* was formulated.[1]

Adherence to this maxim has often resulted in judges' finding themselves wrestling with matters which more fittingly ought to be handled in other forums. Judges have been castigated for assuming the role of a "super-legislature",[2] "super draft boards" [3] or a "super-legal-aid bureau" [4] or a "super board of education." [5] One thinks also of the role of "super constitutional convention" assumed in redistricting under the "one-man one-vote" principle,[6] and of our colleague in the Eastern District Judge Fullam's valiant service as "super railroad executive" in connection with the Penn Central bankruptcy.[7]

In the case at bar we essay the task of "super relief administrator" in order to give effect to the maxim *ubi jus ibi remedium* in connection with a computer breakdown in the issuance of food stamps.

The food stamp program, the testimony in the case at bar discloses, was first put into effect in the pioneer

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[1] Pound, *Jurisprudence* (1959) V, 441–50.

[2] Justice Brandeis in *Burns Baking Co.* v. *Bryan*, 264 U.S. 504, 534 (1925).

[3] Justice Clark in *Witner* v. *U.S.*, 348 U.S. 375, 380 (1955).

[4] Justice Frankfurter in *Uveges* v. *Pennsylvania*, 335 U.S. 437, 450 (1948).

[5] Justice Jackson in *McCollum* v. *Board of Education*, 333 U.S. 203, 237 (1948). See also *Lovelace* v. *Leechburg Area School District*, 310 F. Supp. 579 (W.D. Pa. 1970).

[6] See *Negrich* v. *Hohn*, 256 F. Supp. 173, 178 (W.D. Pa. 1965).

[7] *E.g.* for the latest of a multitude of opinions spawned by that fiasco see *In the matter of Penn Central Transportation Co.*, 332 F. Supp. 1302 (E.D. Pa. 1971).

area of Fayette County, Pennsylvania.[8] The program, authorized by the Act of August 31, 1964, as amended,[9] was designed to distribute agricultural surplus items and other domestically produced food products, through commercial channels (replacing previous programs of direct distribution in kind through government agencies).

The plan undertook to better the diet of low-income beneficiaries by enabling them to purchase a better diet than they had been enjoying, rather than to help them continue the same diet at less cost to themselves.

In furtherance of this statutory scheme, the Secretary of Agriculture established uniform national standards of eligibility, pursuant to which the State agency of participating States issues food stamp coupons.

Coupon allotments shall be in such amount of face value as the Secretary finds from time to time to be the cost of a nutritionally adequate diet. However, the beneficiaries pay less than the face value for coupons. The amount they pay is to represent "a reasonable investment" on their part, but in no event more than 30 per cent of the household's income. The amount paid is governed by a sliding scale, dependent on the beneficiaries' income bracket.

The coupons are accepted at face value by grocery concerns approved to participate in the plan, and are eventually redeemed at face value by the federal government.[10]

In other words, the beneficiaries receive coupons at

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[8] Fayette County also enjoyed the distinction, during the Depression era, of having a higher percentage of the population on relief than any other county in the nation.

[9] 78 Stat. 703, 28 U.S.C. 2011 *et seq.*

[10] Specific appropriations are made for this purpose. 7 U.S.C. 2025.

a discount. It is as if the government instituted a plan to enable school children from impoverished areas to visit the National Capital, Independence Hall, the Alamo, Valley Forge, and other patriotic sites which every citizen should have an opportunity to visit, and issued through the State school system government transportation requests (at a discount varying in proportion with the beneficiary's lack of income) which the airlines and bus companies would accept from the passengers and present to the government for payment in accordance with the applicable standard rates and tariffs.

Although the Act indicates that the State agency shall issue the coupons [7 U.S.C. 2019(b)], the testimony shows that the States in fact issue cards designated as ATP (authorization to purchase), which are then presented to banks in exchange for the coupons to be used in the grocery stores. The testimony of James H. Kocher, in charge of administering the program, points out that the Program is voluntary in the sense that each month many ATPs issued are not exchanged for stamps especially by persons in higher income brackets where the discount from face value of the coupons obtainable is smaller.

Regulations provide that duplicate ATPs may be issued within the month of original issue in case of loss in the mails or other failure of the beneficiaries to receive their allotment.

Mr. Kocher is of the view that this one month period is adequate and reasonable, and that if delayed issuance of ATPs or purchase of coupons were permitted, it would encourage laxity on the part of State agencies in handling the issue and reissue of authorizations to purchase coupons.

The administrator also points out that the issue *nunc pro tunc* in a lump sum the amount of coupons

in arrears would encourage illegal disposition of the coupons in the black market, as a glut of groceries would be purchasable in excess of what the family receiving such a windfall would normally be able to use.

The facts in the case at bar, as developed in the record, seem to show that due to computer breakdown on the part of the Pennsylvania State welfare agency a number of plaintiffs failed to receive (over a three-month period) their duly authorized allotment of ATPs. No negligence on the part of the federal government in connection with administration of the food stamp program is shown. The fault is that of the Commonwealth of Pennsylvania (or, as the defendants urge, the individual plaintiffs in failing to hound down the State welfare agency diligently enough and soon enough to obtain reissuance within the one-month period). But apparently the plaintiffs did contact their case-workers on more than one occasion, but without results.

The Commonwealth contends that it has no appropriations for bearing the cost of the stamps in arrears, but the federal government does. The State is ready and willing to take any administrative steps directed by the Court, but not to pay any money to make good the missing stamps.

The federal government (in addition to the usual arguments on sovereign immunity and the like) contends that the purpose of the food stamp plan is to provide a nutritious diet; that *non vivitur in praeterito*, a stamp recipient can not eat this month with nutritional advantage the food he should have eaten last month or three months ago; that if plaintiffs

succeeded in surviving to the present time [11] without the food they should have eaten in the past, nothing can be done about it now; that if in fact they did eat an adequately nutritious diet during the stamp shortage by skimping on other debts and obligations, their problem is purely a financial, economic, or pecuniary problem, incident to poverty, and not a nutritional problem relevant to the policies subserved by the food stamp program.

We agree with other courts that have passed upon the issue that the right to receive benefits under the food stamp program is a statutory entitlement. Issuance to eligible recipients is mandatory under the Act.[12] Deprivation of such a right is a denial of property, without (it would seem under the circumstances) due process of law. A violation of equal protection is also established by discrimination between eligible recipients who did, and those who did not, receive their allotments of stamps.[13] *Goldberg* v. *Kelly*, 397 U.S. 254, 262 (1970).[14]

The rule *ibi jus ibi remedium* has often been recognized by federal courts. *Bateman* v. *Ford Motor Co.*,

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[11] Incidentally, plaintiff Tomasina Tindall died on December 8, 1971 (of what ailment the record does not disclose) but left children themselves eligible for food stamps during the period of non-receipt.

[12] "The face value of the coupon allotment . . . shall be in such amount as will provide . . . a low-cost nutritionally adequate diet." 7 U.S.C. 2016(a). "The State agency of each participating State shall assume responsibility for the certification of applicant households and for the issuance of coupons." 7 U.S.C. 2019(b).

[13] This Court therefore has jurisdiction under 28 U.S.C. 1343.

[14] See also Reich, "The New Property", 73 Yale L.J. 733 (1964); and Fontaine, "The Constitutional Law of Remedies in Welfare Litigation," 23 Maine L. Rev. 41 (1971).

302 F. 2d 63, 66 (C.A. 3, 1962) [Equitable remedy implied]; *Sullivan* v. *Little Hunting Park*, 396 U.S. 229, 239 (1969) [all necessary and appropriate remedies implied]; *Bell* v. *Hood*, 327 U.S. 678, 684 (1946) [any available remedy]; *Jacobs* v. *U.S.*, 290 U.S. 13, 16 (1933) [promise to pay just compensation implied by taking]; *U.S.* v. *Johnson*, 390 U.S. 563, 566 (1968) [an extreme case implying criminal prosecution in spite of express statutory limitation to other specified remedies]; *J. I. Case Co.* v. *Borak*, 377 U.S. 426, 433 (1964) [such remedies as are necessary to make effective the congressional purpose].

We therefore follow the practice established by Judge Orrin G. Judd in *Russo* v. *Kirby*, No. 71–C–1327, E.D. N.Y. December 13, 1971, where he declined retroactive adjustments as forbidden by the United States Department of Agriculture regulation, but directed "forward adjustments of food stamps." Recognizing that issuance of excess stamps would create a temptation to use the black market, Judge Judd went on to explain that

> "Forward adjustment is not subject to these objections. It merely extends eligibility for the number of months the participant was wrongfully denied stamps. The participant would still purchase only one month's allotment each month and would not receive stamps in excess of the estimated monthly consumption of the household. Where a forward adjustment is made, the participant would not be tempted to sell the stamps or hoard food, but could use the money saved on food purchases to repay loans or credit received during the period when food stamps were improperly withheld, or to fill other family needs that had to go unfilled in that period. Nothing in the regulations forbids a forward adjustment by the issuance of additional food stamps in future months."

The Commonwealth will be directed to issue stamps in the future, and adjust the discount, until the plaintiffs' respective hitherto-withheld allotments are exhausted.

We believe that it is not desirable or necessary to proceed in this action as a class action. There would be several hundred specific fact questions to be explored with respect to the affected recipients. We believe that the effect of this Court's holding as a precedent (particularly if upheld on appeal) will be honored by the respective State and federal administrators, and that they will doubtless make appropriate voluntary forward adjustments in the cases of other affected parties not participating in this litigation after the legal issues in controversy shall have been authoritatively settled.

APPENDIX D

INJUNCTION

AND NOW, this 18th day of January, 1972, after hearing of evidence and arguments, and of briefs in support of and in opposition to plaintiffs' application for injunctive relief,

IT IS ORDERED, ADJUDGED, DECREED, AND FINALLY DETERMINED, that defendants be, and they hereby are, permanently enjoined from failing, neglecting, or refusing to issue through the usual channels to plaintiffs ATPs and/or food stamps, at the usual monthly intervals and in the normal amounts to which plaintiffs are respectively eligible, and to redeem the same through the usual channels and applying thereto available appropriations which shall have from time to time have been made by the Congress, upon such terms and discount as shall to the federal Department of Agriculture seem appropriate and most suitable as a forward adjustment, in order to carry out the statutory policies (an additional discount each month of fifty per cent of the amount which plaintiffs would respectively normally pay as their "reasonable investment" per month for such ATPs or stamps being perhaps *prima facie* the most appropriate and suitable amount of such additional discount) until the respective arrearages incurred on behalf of plaintiffs shall have been amortized, liquidated, extinguished, and exhausted.

DUMBAULD,
United States District Judge.

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